No. 2410

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENSON LUMBER COMPANY, a corporation,

Plaintiff in Error.

vs.

H. C. McCANN, by Jesse F. McCann, his guardian ad litem,

Defendant in Error.

Brief for Defendant in Error

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STATEMENT OF THE CASE.

This action was originally brought in the Superior Court of the County of San Diego, State of California, on July 30, 1908, to recover damages for personal injuries sustained by the defendant in error hereinafter referred to as the plaintiff, on July 30, 1907.

It was removed to the then Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, in January, 1909, but was not reached for trial in the District Court of the United States until September 12, 1913, more than six years after the time of the casualty. The injuries were received by plaintiff while employed in the saw-mill of the plaintiff in error, hereinafter referred to as the defendant.

The cause was tried upon the second amended complaint and the amended answer thereto, and an amendment to said answer (Trans., pp. 43 to 51; 68 to 82). The complaint, in paragraph 3 thereof, described the general construction and operation of the mill which is substantially admitted in the answer.

In brief terms, the work of the mill consisted of continuous, connected and contemporaneous processes of converting logs into lumber, in the course of which the lumber, after having passed through the preliminary stages was conveyed to a trimmer table inside of the mill, which sawed it into the desired lengths; and as sawed, the revolving devices in the trimmer carried the manufactured lumber and dumped it sidewise upon skids, making a slide outside of the mill leading downward to a "push table" in the surface of which were revolving rollers, including a roller studded with "dogs"; *i. e.,* projections or spikes; these rollers carried the lumber at right angles from the direction in which it was received from the skids until it dropped two feet downward upon the loading, otherwise called the carrying table; from which the lumber was taken and loaded on trucks by the employees to be wheeled away.

THE ISSUES.

The plaintiff in substance alleges that on July 30, 1907, he was of the age of 17 years and 3 months, and was in the employ of the defendant in thus loading lumber.

That by reason of the defective condition and operation of the "slide" it failed to properly carry the lumber down upon the push table, by reason of which accumulations, jams and clogs of the continuous stream of lumber frequently occurred.

That the defendant required of plaintiff, as part of his employment whenever such jams occurred, to mount said push table while said rollers therein were in operation and

lumber was being delivered in a continuous stream from the inside of the mill to disentangle and loosen such jams, and see that the lumber was kept moving down the slides, and on and from the push table upon the loading table. That this work was required to be done while the mill, including said rollers in the push table, was in full operation, amid the great noise and confusion attendant thereto, and without interruption of the stream of lumber from the mill; that the work and labor of loosening and releasing the lumber required extreme and desperate haste and the exercise of great and violent muscular exertion, and under the circumstances was of an extremely distracting character, and particularly unsuitable for a youth of plaintiff's age and experience. That by reason of the said conditions the said push table was an unsafe and dangerous place on or about which to work, and the work itself made perilous and unsafe, as defendant knew.

That with full knowledge of plaintiff's youth and inexperience the defendant failed and neglected to warn plaintiff of the dangers and perils incident to said work, and carelessly, negligently and recklessly required plaintiff to expose himself to said perils and dangers.

That defendant failed to use ordinary or any care to provide a safe way or appliance for plaintiff's use in mounting said "push table", and had provided no other means for mounting upon said "push table" than to step up and upon the same from said "carrying table" over said "dog roller" revolving at the end of said push table, next to said "carrying table". That said "push table" was defective and unsafe in that defendant did not have or provide a reasonably safe means to protect plaintiff from said dog roller.

That on said July 30, 1907, while plaintiff was so employed, a jam of lumber occurred between the skids of the slide and on the push table; that while plaintiff, in the

course of what was required of him in said employment, was mounting upon said push table to disentangle the lumber which was so clogged, jammed and piled up on said push table, plaintiff's right foot was caught by said dog roller and he was thrown down upon said push table and his foot bruised and mangled, requiring its amputation.

The amended answer denied all the allegations of negligence, and makes denials that plaintiff "was required to go upon said push table" (Tr., p. 70); avers that the said push table was not a place on which any employee or person whomsoever was required or expected or permitted to work (Tr., p. 71); alleges that said push table "was as safe as it was possible for a machine of its nature and kind to be" (Tr., p. 71); "denies that plaintiff was expected, permitted or required by defendant, or any of its servants, agents or employees to mount or go upon said push table" (Tr., p. 73); states that defendant, "inasmuch as said push table was not a place where work was to be done, or which it was expected would be mounted, denies that any duty rested upon it to provide any means, way or appliances for the use of plaintiff or any person to mount or go upon the same" (Tr., pp. 73-74); "denies that at said time * * * the said outside platform or 'push table' was a place for plaintiff to work in, or in which he was expected, permitted or required by defendant to work, whether unsafe, as stated in the complaint, or at all" (Tr., p. 74). The defendant further alleges "that it had instructed said plaintiff not to go on, over or upon the said push table, and had not only warned and instructed him not to go on said push table, but had ordered him not to go on said push table: that there was no necessity of plaintiff's getting on said push table" (Tr., p. 76).

In line with these reiterated denials, and averments is the admission (Tr., p. 70):

> "And defendant further answering admits that it had provided no means for mounting on said 'push table' and alleges that such push table was not to be mounted by any of the defendant's servants, agents or employees at any time, while said mill was in operation."

Reference is made to these repeated denials and averments to the effect that the push table was never to be mounted while the mill was in operation, and that there was no necessity for so doing; and the admission that no means were provided for mounting it, to call attention to the significant change in the attitude of defendant on this subject by the amendment to the answer made at the trial, September 12, 1913 (Tr., p. 82).

This amendment strikes out all that part of paragraph 4 of the amended answer, including all the matter in the last clause of the same commencing with the words above quoted, to-wit: "and defendant further admits that it provided no means for mounting on said push table" (Tr., p. 70), and includes in the stricken portion the allegation that the push table was not to be mounted "while said mill was in operation"; and substitutes itself in place of the matter stricken out.

In this amendment occurs this language in its context:

> "That it was the custom of the employees *whenever it became necessary to mount said push table,* to mount the same from the lumber buggies, which was a safe, easy and convenient means of mounting said push table."

This amendment, we submit, made a vital change in the theory of the defendant, both by what it struck out and what it impliedly admits.

Whereas the original amended answer denied that there was any necessity to mount the push table, this amendment concedes it. Whereas the original amended answer con-

tained the allegation that the push table was not to be mounted while the mill was in operation, the striking out of that allegation in connection with the allegation conceding the necessity for mounting, concedes that such mounting was to be done while the mill was in operation.

Instead of the allegations in the original amended answer that no employee was permitted to mount the push table, the defendant by the amendment alleges the *"custom of the employees whenever it became necessary to mount said push table to mount the same."*

Thus all the elaborate denials that defendant did not require or expect its employees to mount the push table while the mill was in motion is abandoned, and all that was left in issue under the denials in respect of this extraordinary requirement was whether, in making it, defendant used ordinary care commensurate with the circumstances and the age and experience of plaintiff to make it safe for plaintiff to mount the table to loosen jams and accumulations of lumber.

In addition to such residuum of denials, the amended answer pleaded as defendant's affirmative defenses, that plaintiff assumed the risk of his injury; and that he contributed to it by his own negligence.

The amended answer also alleges as a distinct defense that plaintiff's injuries were caused wholly or in part by the negligence of his co-employees. But no evidence was introduced in support of this defense and no insistence was made upon it at the trial.

The trial was had before a jury upon the issues as to the negligence of defendant, as to the defense of assumption of the risk and as to the defense of contributory negligence.

The verdict having passed for plaintiff, the defendant brings this writ of error herein.

THE CASE AS DEVELOPED BY THE EVIDENCE.

The case is entirely free from any objection to testimony or evidence and the record contains no assignment of error in that behalf.

The printed brief for defendant begins the argument with the following statement:

> "We feel that it is a very debatable question whether there was any evidence to warrant the implied finding of the jury that plaintiff in error was guilty of negligence. We do not discuss that issue however."

Since debatable questions of fact must be resolved by the appellate court in favor of the verdict, it would seem that this amounts to a virtual concession that the defendant was negligent in all the respects which any evidence tended to prove.

Notwithstanding this apparent concession, that the verdict is justified in finding defendant guilty of negligence, we deem it proper, especially having regard to the vital bearing of negligence on part of the master upon this defense of assumption of the risk, to follow the suggestion of the author of Labatt's Master & Servant, p. 3113, 2nd edition, where he says.

> "But the present writer is strongly of the opinion that, in practical litigation, the method of inquiry which will produce the most equitable and satisfactory results is that which fixes attention first of all upon the question of the defendant's negligence."

To this end, it seems desirable to refer to the evidence including that respecting the "trimmer table", the "push table", the "carrying" or "loading table", and the "loading platform" with which the ordinary and extraordinary work required of plaintiff brought him in relation. The exhibit 1 in connection with the photograph furnished by defendant, made Exhibit 2, pp. 262-263, of the transcript,

and set out on pp. 7 and 8 of the brief, assist in comprehending their relation taken in connection with the description of the *locus in quo* given by McCann, pp. 94-101, 103-108. The trimmer was entirely inside of the mill and the letter "E" on the plat simply indicates the east wall of the mill behind which the trimmer was located. In the photograph "E" simply marks the one skid nearest the south end of the push table.

This trimmer table was 32 feet in length, east and west, by 12 feet in width. Its easterly side, over which the lumber was discharged upon the slides was in an opening in the east wall of the mill at a height of not less than 8 feet 7 inches above the level of the loading platform, marked "F" in the two exhibits; and 5 feet above the level of the carrying table "B", and 3 feet above the level of the push table; it sloped from the east wall of the mill for its width of 12 feet inward and downward within the mill. In this trimmer there reached endless chain lumber carriers from west to east. The workman who operated the trimmer had his location at the southwest corner of the trimmer lower than the lower end of the trimmer (Tr., p. 97-98). The east side of the mill below the trimmer was boarded up so that it is apparent, as the testimony shows, that the operator could not see the lumber after it was delivered over the trimmer to the skids leading to the push and carrying tables (Tr., p. 98, 223). Nor could he see any thing of jams on the push or carrying table. He was out of sight from the place where the plaintiff and his associates worked (Tr., p. 223). The operator of the trimmer table could check for a limited time the stream of lumber coming to him from passing over the trimmer. But there is nothing to show that he had any control of the motive power which operated the carriers in the trimmer or the rollers in the "push table". This power was applied from the central machinery in the inside of the mill. When a

jam got so bad that he had to be signalled to stop the stream of lumber he could not be made to hear by shouting on account of the noise, but nothing short of mounting the carrying table and throwing a block or some such object to him would attract his attention (Tr., p. 129-139). The function of the trimming table was to saw the lumber of the lengths in which it came from the log as it passed over that table into merchantable lengths by disappearing saws worked by treadles; the longest pieces fell on the push table and the shorter ends trimmed off fell upon the carrying table (Tr., p. 98-99).

That any reasonable or adequate method of attracting the attention of the operator of the trimmer to check the stream of lumber over the trimmer was provided cannot be claimed under the testimony. Indeed, it is apparent that it was not expected or intended that any attempt should be made to stop his work, and that the utmost exertion was required of the loaders to avoid checking up his work, for this led to the accumulation of lumber on him (p. 130). Kelty testified (Tr., p. 189-190):

> "I couldn't say that I ever did see the trimmer stopped to clear away a jam on the push table. It would be a good thing to do it. I couldn't say I did see it stop for the purpose of clearing the push table."

The surface of the push table "A" was 5 feet 7 inches above the level of the loading platform "F". Its length was 17 feet 11 inches and its width 4 feet. It had in its surface five iron rollers, which revolved from north to south, each of 6 inches diameter, one at the north end; one at the south end, which was studded with dogs or spikes, and the other dividing the intermediate space between the two center ones. They rose an inch above the surface of the table and were given from 100 to 150 revolutions per minute, the motion being communicated to them by being geared to a revolving shaft of the same velocity two inches

in diameter, extending along the east edge of the table for its whole length within about six inches of its top. The upper surface of this shaft was for more than half of its diameter exposed and uncovered. It was protected by a board at its under side but not at the top (McCann, Tr., p. 152, 171; Kelty, p. 195); Exhibit 2, p. 263; Coffin, contra, p. 223; and see photograph.

This push table at the time of the casualty was removed three feet east from the east wall of the mill and the space between the west side of the push table and the transverse opening in the east side of the mill was bridged at the time of the occurrence by six skids of lumber set up edgewise (Diller, p. 174), which extended from the western line and surface of the push table up to the eastern edge of the trimmer in the wall of the mill, 3 feet vertically above; this made the inclination of the skids about 45 degrees (Tr., p. 106). Below the space bridged over by the skids was a pit (Tr., p. 118). Along the east edge of the surface of the push table for its whole length was a 4-inch wide guard of planking extended for a height of 2 inches above the surface of the push table (Tr., p. 104, 174). The purpose of this was to keep the lumber ejected by the revolving chain carriers of the trimming table over the upper edge of the trimmer and down the skids on the push table from going over the east side of the table and the revolving shaft there (Tr., pp. 104, 164-165). Jams and the force of lumber coming down against this rail had the effect to bend and gouge it out.

The force with which the sticks and pieces of lumber came down these skids is variously described by the witnesses. "They came down rather swiftly"; "with considerable force" (McCann, tr., p. 164-165). "That timber comes down there very viciously" (Coffin, Tr., p. 216). The skids were gouged out on the surface and broke off

at the ends. As shown in the photograph they show wear (Kelty, Tr., p 198; Coffin, Tr., p. 219).

The design of this push table was to work automatically in transporting the lumber which was precipitated down the skids from the trimmer table at right angles from the direction in which it was received, southward and land it upon the carrier table.

The carrier table was located with its nearest edge two feet south of the south edge of the push table and two feet lower in elevation. It extended east and west and was provided with flat link chain carriers revolving in its surface in that direction and therefore at right angles to the direction in which the lumber came from the push table. Upon this carrier table there were precipitated the shorter pieces of lumber over skids from the trimmer at the same time that it was receiving lumber from the push table so that the two streams of lumber met on the carrying table (Tr., p. 98). The function of this table was also to work automatically in carrying the lumber eastward until it was held up by a timber nailed across it at a distance on a line as far east as the loading platform extended, which was ten feet from the push table. The checking of the movement of the lumber at that place was a temporary arrangement, as the construction of the carrying table then going on contemplated that it should be extended to a length of 125 or 130 feet (Diller, p. 174). But in its uncompleted condition at the time of this casualty the plaintiff and his associates were required to handle the whole output of the mill upon what was termed the loading platform.

The loading platform is marked F on the two exhibits. It extended from the line of the carrying table northward along and beyond the east side of the push table adjoining. It was only ten feet wide east and west, and as the witness for defendant, Kilty states (Tr., p. 197) "It was a rather

confined and congested place to handle all this lumber and at the same time to have the men keep watch of the push and carrying table," but, he adds, "it answered the purpose."

The significance of the fact of this uncompleted condition of the carrying table at the time of the casualty lies in the fact that the plan of construction contemplated the removal of the lumber loaders entirely away from all care for or oversight of the operation of the push and carrying table, the loading and sorting of the lumber being done when it was completed in the ample room afforded by the extension of such table for its 125 or 130 feet. After the completion, the oversight of the push and carrying table and skids in their completed installation and adaptation was committed to a man distinct from the loaders and made an entirely separate employment, and the loading table was abandoned as such (Tr., pp. 93, 99, 105, 174-5).

The loading table was depressed 5 feet 7 inches below the surface of the push table, and 3 feet and 7 inches below the surface of the carrying table. The space between the push table and the carrier table had a small platform at the height of 2 feet 4 inches from the floor of the loading platform F (Tr., pp. 112, 141) with a small step leading from F to it for the purpose of facilitating getting up on to it (Tr., p. 177). From this small platform to the carrying table was 1 foot 3 inches.

This mill commenced operation in May, 1897, and was, therefore, new. The plaintiff had been employed the earlier two weeks, about five weeks before his injury, as a laborer to load lumber on two-wheeled push carts after it came from the mill. During that time the mill was without a push table or carrier table, but the lumber was sent from the trimmer over skids to the loading platform (Tr., p. 180). Plaintiff was then laid off for a week or more during which time the defendant installed the push table

and carrier table to receive and deliver the lumber from the trimmer within reach of the workmen to be loaded on trucks for removal. Plaintiff was re-employed to do the same work (Tr., 109, 130-131, 180). Defendant's outside foreman, Kilty, describes the work assigned to him as follows (Tr., p. 179):

> "He was one of four men to take the lumber as it came from the mill and delivered on the carrying table there, as it has been named, to load it on trucks. I told him what to do."

That this newly installed machinery was expected to work automatically in bringing the lumber within reach of these four men without necessity for having their defective operation supplemented by the men mounting upon the push and carrying table is clear. Kilty says (Tr., p. 193):

> "It wasn't anybody's regular business to get up there. *When the thing was built it wasn't intended that anybody should get up there.*"

The original amended answer plainly went upon the theory that what was so intended, was what the machinery was capable of accomplishing, without requiring anyone to mount these tables to help out their very defective operation which resulted in all sorts of jams, cloggings and eccentricities in their work of conveying the lumber, which if not relieved would call for stopping the whole operation of the mill.

But as recognized by the amendment to the answer at the trial the necessity for relieving the recurring results of this defective functioning soon developed when the work began after the installation of the new machinery.

This necessity arose from the defective installation of the push table and the defective construction of the skids leading to it. The skids were of wood without any bear-

ing surface of iron (Tr., p. 167). As Kilty says (Tr., p. 198):

> "These skids were of wood 2x6 and were not shod with iron at the time this accident occurred, and all sorts of lumber came down on them; some heavy lumber; all kinds of lumber—everything that came down from the mill. Naturally it very soon gouged out the surface of these skids and broke off the ends. It will wear—looking at the photograph, those skids show wear. The irons were put on them to preserve them" (that is after the casualty).

The natural consequence of this condition of the skids was to carry and deliver the lumber in all sorts of eccentric ways and to defeat the automatic action of the skids and push table. Sometimes a stick of lumber would be thrown so that it stood upright between the skids with one end in the pit and the other end sticking above the skids, which created a jam. (Tr., pp. 117-118). Coffin testifies that at the time of the casualty a 2x4 or a 2x6 there stood and was making a jam as well as that a board had lodged on the table. (Tr., p. 222). The defective operation of the machine thus installed as shown by the undisputed testimony, caused a necessity for some agency to mount the table to relieve the jams. This labor and risk was an extra-hazardous work, superadded to plaintiff's proper work and imposed on him by defendant.

It was in fact a period of experimentation with the installation of this new machinery. The defendant experimented with it at the expense of the lumber loaders and particularly of plaintiff, the youngest and most willing worker, emulous of approving himself to his employer, under whose eye and insistence he repeatedly exposed himself to the lurking danger that led to his injury, which we hereafter more fully discuss.

So we have the testimony of the witness for defendant Kilty, who cannot be accused of any effort to favor the

plaintiff. We submit that his testimony, which we are about to quote, justified the court in submitting it to the jury, and supports the implied finding by the verdict of the truth of the allegations in the complaint that defendant imposed on plaintiff the requirements to mount the push table while the mill and rollers were in operation whenever jam and stoppages of lumber made that necessary. Kilty testified (Tr., pp. 192, 193):

> "I don't believe there is anybody that could tell about how many times during that two weeks that the machine was set up that the men had occasion to get up on the push table. I didn't keep track of it. *It would be a good many times.*
>
> "I saw Mr. Coffin and the young man upon that push table and was up there myself. Also saw the scaler up there sometimes, the man that scaled the lumber, that tallied it; he would happen to come along there from some car and would punch it out. It wasn't anybody's regular business to get up there. *When the thing was built it wasn't intended that anybody should get up there. The men did go up frequently, as they found they had to because the lumber would go wrong,* something would happen that would cause it to stop, and if they didn't get up there and release these jams the lumber would eventually pile up so it would have to be taken off and loosened. *Certainly, they had to remove those jams;* I don't say they did not have to get up on that platform. I haven't said that; *it was necessary to go up there on the push table.* I did not see them every time it was necessary to get up there; I was not there all of the time. It was the place of these four men to look after these jams. If that jam occurred or trouble occurred on the carrying-table, it wasn't anybody's duty to see to that; these four men had to take care of all the lumber that come down there to see that it was put on those trucks."

Kilty also says (Tr., p. 196):

> "These men had to do all the work of loading this lumber upon these carts, *and it was their duty to see that the lumber was not jammed on the push table, or the carrying table.*"

This testimony above amply supports the position that after the plaintiff was employed merely to handle and load lumber in which there was no risk, there was imposed upon him the *extra-hazardous* requirement to mount the push and carrying tables, and expose himself to all the risks of injury from the moving machinery and descending and shifting lumber of all sizes from timbers 8x8 inches to inch boards, in order to relieve the consequences of the defectively working machinery.

But on this point there is absolutely no conflict in the testimony. That Kilty denies that he gave an explicit order to plaintiff to mount the push and carrying tables to release a jam, is of little consequence, in view of the plaintiff's testimony and the uncontradicted evidence that both he and Kilty and the superintendent of the mill expected and required it to be done and saw that it was done.

We submit, further, that the evidence fully justified the submission to the jury of the issue made upon the allegation that this extra-hazardous required work beyond the scope of the contract of hiring, was extremely severe and distracting, and particularly unsuitable for a youth of plaintiff's age and experience. In the first place it superadded just that much to the regular and ordinary work for which plaintiff was employed. And in the next place the very nature of disengaging a jam while the stream of lumber continued necessarily required extreme haste, leaving little time for the exercise of caution, deliberation or reflection.

As to the character of the work and the occasion for mounting the push table at the time plaintiff was injured,

we quote from the testimony of the witness for defendant, Coffin (Tr., pp. 221-22):

> "We were pushed pretty heavily on the day that this accident occurred. It was pretty heavy work, anyway. When we had an 8 by 8, we would double, the four of us, on it, or more if we needed them. Ordinarily we four men were expected to take the whole output of the mill, and handle it. It was part of our work to keep the lumber moving on the push-table there, and on this narrower table. It was a very strenuous work, about as hard a work as I ever did. I think it was the hardest I ever did. If the mill did happen to stop on account of filing the saw, or something of that sort, we worked ten hours. We commenced in the morning at seven o'clock and worked until twelve. And then commenced at one and worked until six. And this is the work we were doing at that time. I do not recall of the mill being stopped at any time to allow the putting in of a skid or fixing it. The lumber used in the skids, as you have them represented there, I think was 4 by 8, or 12, I am not sure —by 8, I think. I think 4 by 8, at that time it was either 3 by 8 or 4 by 8, I am not certain which. I know I made one of them and put it in myself. All sorts of lumber came down over those skids. Just before I saw McCann jump up on to the carrying table, the day of the accident, I was standing about the middle of the—partially facing it, and this carrier here. Both of them, both of these tables, pretty nearly, so we could see both. There was a pretty heavy jam at the time. Part of it lay on this lower table, and part of it on the skids, these two skids; I don't think there were two together, but the stick got in back here, a 2 by 4, I think it was, like that; this was already jammed with a little board, the way I remember it, down here, like that: when a board got on there these rollers would not have any effect on it to carry it, so this 2 by 4 got in like that, or a 2 by 6, I do not remember which it was, and it stood up endways, and

this lumber had jammed here, and this came in up here and made a double jam on it."

See also testimony of McCann(Tr., pp. 122-123).

We submit that the evidence justified the submission to the jury of the issue upon the allegation that defendant gave plaintiff no warning or instruction as to how to mount this push table, or as to any danger involved in so doing, although the general manager and the foreman knew that plaintiff upon occasion adopted that method of mounting.

McCann (Tr., pp. 114-115, 120, 122-123, 125).

From Kilty's testimony (Tr., p. 201), we quote the following:

"When I employed *this boy* I did not take him and point out the possible dangers of this machinery; I showed him his place and started him, instructed him what to do, the same as all the rest of the men. I never said anything about the jams at all to any of those men about that push-table. They knew their job was to release those jams, if there was any. Every man around the place knows their job. The *boy* knew that, too. I did not instruct him at all as to how he ought to go up on the push-table; I just told him where his place was to work, that is what I told him. I didn't tell him that I expected him to work at releasing these jams when it occurred; I didn't happen to tell him that duty; I didn't tell that to any man there. They knew it was part of their job; they were there to take all the lumber that came from the mill; they were to take it off of the platform, and it was their work to see it came on the platform. They knew that; I didn't have to tell them that particular thing that way. They knew if it was necessary to do so in their judgment they must get up on to the push-table; they knew their job and they knew they had to take all the lumber that came from the mill. I didn't tell them how to get up on the push-table; I didn't speak about the push-table at all; I never had to give

them that particular instruction; I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that."

We further submit that the evidence justified the submission to the jury of the issue upon the allegations that the defendant, though requiring the mounting of the push-table, provided no proper or safe way or appliance to be used in mounting it. The testimony of Kilty above quoted contains the statement:

"I did not instruct him at all as to how he ought to go up on the push-table."

And here we take occasion to point out an error into which the brief for defendant falls in the statement (page 13):

"that one day he (Kilty), saw the defendant in error up on the *push-table* and that he called him down immediately."

On this subject the testimony of Kilty simmered down on cross-examination to the following (Tr., p. 196):

"I saw the young man on the *carrying table* at one time and asked him to get down so he could clear the table—keep the table clear. He was doing nothing there. I wanted him to get down and hustle up the work, get the tables clear. That was all that was necessary, to keep that lumber off the table; and that is all I said, to get down and get the lumber off the table on the cars and hustle the work."

The succeeding part of the statement on page 13 of the brief, to-wit: "that he often told him to come down and stay on the loading table" seems to imply that Kilty was speaking of coming down from the *push-table;* we submit that Kilty's reference was altogether to the carrying table (Tr., pp. 183, 184, 190). Already this statement

shrunk on cross-examination to a single occasion, as shown by the above quotation from the transcript, p. 196.

The following statement on page 13 of the brief, to-wit: *"that men who were loading lumber were not expected or required to go upon the push-table,"* we must protest, is directly contrary to all the testimony in the case; as we read the testimony of every witness for plaintiff and defendant, to-wit: McCann (Tr., pp. 103, 105, 114, 119-120, 122, 123, 131, 143, 170); A. W. Diller (Tr., p. 175): "These men saw to releasing any jams of lumber as it came from the trimmer." Kilty (Tr., pp. 185, 186, 189, 190-191, 192-193, 196, 197, 201, 202); Coffin (Tr., p. 221): "It was part of our work to keep the lumber moving on the push-table there and on this narrower table;" All unite in testifying that this extra-hazardous work was imposed upon these four men.

Moreover the jury was quite justified in believing the testimony of McCann (Tr., p. 168), that:

> "The reason I did most of this work was that I had orders to get up there, and then I was, as you might say, ambitious to do the work, so I would be in favor and be promoted."

For Kilty said (Tr., p. 202):

> "The *boy* seemed to be ambitious to do his work and I considered him a good willing worker."

With respect to the statement, on page 14 of the brief, "that plaintiff denied that he had been warned by Kilty to keep off the push-table," we are unable to find in the record either any evidence that Kilty warned plaintiff to keep off the push-table or that there was any denial or occasion to make the denial as suggested, since there is no evidence that Kilty gave any real warning, or at any time found any fault with plaintiff for mounting the push-table.

What the evidence of Kilty does show, however, is that while plaintiff was required to mount the push-table

whenever there was occasion to do so to release a jam, he declared that he "did not instruct him at all how to go up on the push-table." (Tr., p. 201).

He says, however, (Tr., p. 204):

> "I guess there seemed to have been a choice here how to get up, whether to get up on to this push-table over the cart or some other way; that is, one way you could do it."

This is as much as to say that this foreman and Evenson, the manager of the mill, left it to the judgment of the plaintiff in any given fortuity of condition of things about the push-table when a jam occurred, whether he should mount by a lumber cart over the revolving shaft, or from the carrying table over the revolving dog roller. That there were means *provided* to mount the tables is not even claimed. They were the only possible alternatives presented to plaintiff by a plant as bare of any appliances to mount this push-table as though the machine had been properly installed and in perfect operation doing its full function automatically with never an occasion to mount the push-table at all to release jams. And yet plaintiff was given no warning or instruction, but left to his own unguided judgment whether under a given state of things he should pursue one or the other of these two alternatives.

It is as convenient here, as elsewhere, to comment upon what is clear from the evidence as to the risk of mounting upon this push-table from one of these two-wheeled lumber push carts.

These carts had platforms extending over the wheels, and this platform, as shown by the testimony, was between two feet and two feet and six inches in height above the floor of the loading platform. (Tr., p. 145.)

The surface of the push-table was 5 feet 7 inches above the level of the loading platforms. To mount from an empty cart standing by the push-table upon the push-table

involved a climb of more than 3 feet over the revolving shaft (Tr., p. 168). The only way this could have been done would have been to reach over the shaft, grasp the 4-inch guard rail extending along the east side of the push-table, and draw the body up over the revolving shaft, pressing upon it in the ascent, and the failure to adopt it is not chargeable to plaintiff either as assumption of risk or as contributory negligence. Clearly this was an impossible alternative. And not only would there have been imminent danger in so climbing up of the clothing being caught by the revolving shaft, but there would have been even more imminent danger, not only of the hands, while grasping the guard rail, but of the skull itself being crushed by lumber coming down "viciously" against that guard rail as the undisputed testimony shows it often did. Kilty, with all his bias, admitted that he would not be so foolish as to lean against the roller when revolving. (Tr., p. 194. Kilty said (Tr., p. 201):

> "I gave them no instructions about the push-table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it; you didn't have to tell them that."

What he says (Tr., p. 195), is:

> "If a man was standing on the load of lumber on one of the carts, he could reach in and reach any part of the platform, *if the cart was just right.*"

But at what stage of the loading was the cart *"just right?"* A full load of lumber on one of these carts ran from one to two thousand feet. (Tr., p. 208.) The height of the load from the top of the car was from 3 feet (Kilty, Tr., p. 208), to 4 feet (McCann, Tr., p. 145). This would bring the top of a full load from 5½ to 6½ feet from the level of the loading platform. Manifestly, such a load as an appliance or means over and from which to mount upon the push-table was both dangerous and impracticable.

Loosely piled there was danger of its being drawn over and upon the person trying to climb up upon it. (Tr., pp. 124, 145-6, 156). The mounting of it would have been an undertaking in itself equivalent to the mounting of the push-table itself.

McCann agrees with Kilty that "at times when there was a truck there with lumber piled 'just right' (Tr., p. 113), one could get up from 'F' on to the push-table and not go over the dog roller."

But when was the condition of the cart "just right" in the identical phrase used by both Kilty and McCann? McCann says (Tr., p. 113) *"If the lumber was too high or too low it wouldn't be any good."* And, plainly, the pile of lumber on the truck to make it available as a means for mounting the push table with any safety over the revolving shaft was at such a height as to be low enough to be readily mounted from the platform "F," and high enough to permit of stepping from it over the revolving shaft upon the push-table. In other words, to be "just right" the height of the lumber on the truck had to be somewhere intermediate between the height of an empty cart and a fully loaded one. Upon this point there is no conflict in the testimony.

Now, there is no testimony in the record tending to show that when this injury occurred that the cart which happened to be standing by the push table was loaded "just right." The testimony is all the other way. McCann in his deposition (Tr., p. 124), taken by the defendant November 29, 1909, testified on examination by counsel for defendant:

> "The reason why I didn't try to get upon the truck it was either too high or too low. I recollect it being one of the two; if I remember exactly right, it was piled exceptionally high with pieces that would have

fallen off if I tried to get up on the side and climb up the side."

He also states the alternative thus:

"The most convenient way was to get up on the table, B". (Tr., p. 124).

Nor was this testimony varied by McCann's subsequent cross-examination at the trial by counsel for defendant. (Tr., p. 156).

Now, since there were only two ways for mounting this push-table from the loading platform "F", and since, and all the proof tends to show, without conflict, that mounting from the cart was not feasible, there plainly was no other way left to mount except to step from carrying table "B" over the dog roller upon the push-table. Plaintiff was required to go there and had but one way to go.

We submit that it was flagrant negligence on the part of defendant to confine plaintiff to the choice of either alternative method of mounting the push-table, and that the court properly submitted the question of defendant's negligence to the jury. And that in the condition of the evidence to have given the instruction No. XI requested by defendant (Tr., 259), would have declared as a fact that climbing up by means of the lumber buggies was safe, and would have been highly erroneous.

We shall have occasion to refer to the fact that there is no evidence tending to show that the push cart was "just right" to serve as a means of mounting the push-table, when we come to discuss the error assigned for the refusal to give the instruction XI requested for defendant.

We do not concur in the statement made in the brief on page 11, to-wit:

"There is no suggestion in the record that at the time of his employment any officer or agent of plaintiff in error knew or had any reason to suppose that he was a minor."

In the first place, it is the proved fact that he was only 17 years and two months old at the time he was first employed. Kilty says (Tr., p. 181), that he was "an *ordinary* young man."

In their evidence the witnesses for defendant unconsciously fall into referring to him as the "boy" though Kilty makes a studied effort to refer to him as the "young man" and not a boy.

This (Tr., p. 202), sub-conscious recognition of his youth comes out thus:

> "*The boy* seemed to be ambitious to do his work, and I considered him a good willing worker."

At transcript, p. 201, Kilty says:

> "When I employed *this boy*, I did not take him and point out the possible dangers of this machinery."

Coffin states on his direct examination (Tr., p. 211):

> "I have saw the gentleman, *the boy*. I have worked with him at the Benson Lumber Company."

At transcript, p. 214, on his direct examination, he stated:

> "I hollered both before and after the *boy* caught his foot."

At transcript, p. 224, Coffin says:

> "When I took *the boy's* foot out of there, etc.", and again: "When I lifted *the boy* up, I went right in between and took *the boy's* foot, etc." "I lifted *the boy* up." And p. 225: "I stood down here and pulled the *boy* out this way."

This same witness afterwards on re-examination undertakes to overcome his involuntary admissions that he regarded plaintiff, not as a boy, but as much of a man, as he was 6 years and more later. His testimony was for the jury to reconcile, if possible; and if not possible, to determine whether his sub-conscious reference to the boyhood

of plaintiff was the truth, or whether his later attempt to deny what he unconsciously affirmed was the truth as he knew it.

Again, Dr. Hearne, the surgeon, when the plaintiff was brought to his hospital, on his cross-examination by defendant, stated evidently from the mere appearance of the boy, that he was under age, and that he required a permit from his father and mother before he performed the amputation. (Tr., p. 102).

It has been held that the reference to the injured person by witnesses in their testimony speaking of him as the "boy" in connection with his physical appearance at the time (as inferable here from the testimony of the surgeon), was evidence from which his minority might be found by the jury. *Texarkana & Ft. S. Ry. Co.* vs. *Preacher,* (Tex. Civ. App.), 59 S. W., 593, 594. In that case the injured plaintiff was also 17 years old.

Kilty said he was an "ordinary young man". Dr. Hearne stated:

> "I would say that ordinarily the *boy* is more developed now, and more of a man than he was at that time."

The evidence shows that at the time of the injury he weighed 140 pounds; and 6 years later weighed 170 pounds.

We submit that there was abundant evidence tending to show that his youth was apparent to the defendant at and during the time of his employment, and that the issue upon the knowledge of defendant of that fact was properly submitted to the jury.

We submit that the court did not err in so doing under instruction VIII (Tr., p. 238-9), which defendant's brief (p. 81), admits was correct, but only claims was inapplicable.

On page 39 of the brief for defendant, is a quotation from the record (Tr., p. 117), emphasized by italics as though of particular importance. But, when examined, it is apparent that it stated the mere truism that the mill could be stopped from somewhere inside, where the single engine was which furnished the power for all portions of the mill. But there is not a particle of evidence that plaintiff or his associate lumber loaders outside of the mill had any means of communication with the engineer; nor is there any evidence that the rollers in this push-table were ever stopped for any jam whatever.

There is further, as we submit, an exceedingly important and overshadowing element in the evidence with respect to the unsafe character of the push-table as a place which plaintiff was required to mount or over the dog-roller, one of the only two ways possible, the other one of which was only occasionally and by accident possible, and which the evidence shows was not feasible at the time. That element is the "X board" in front of the dog-roller. We shall fully discuss this in answering the argument that plaintiff assumed the risk of the injury he received.

We submit that the findings implied in the verdict (Calif. Code of Civil Procedure, Sec. 1963, Sub-div. 18), that that defendant was guilty of every charge of negligence made in the complaint are supported by the evidence; and that such evidence required the submission of the issues as to defendant's negligence to the jury and that the court did not err in refusing to direct a verdict for the defendant on those issues.

The respects in which the defendant was thus found negligent may be summarized thus:

1. In that defendant maintained defective installment of its machinery for delivering lumber to the loaders, of whom plaintiff was one, causing exposure of plaintiff to

extra-hazardous risks of mounting the push-table while the mill was in operation to release jams, outside of and in addition to the work to do which plaintiff was employed.

2. In that it maintained this push-table in an unnecessarily dangerous condition.

3. In that it provided no proper appliance for mounting the same, necessitating the mounting of it over the dog-roller.

4. In that it ordered and required plaintiff, knowing his youth and inexperience, to mount the push table as best he could, without giving him warning or instruction as to the dangers involved in so doing.

5. To this is to be added, that the sum total of all these defaults on part of defendant, taken together with the excessive strain and stress and hurry, amid the noise and confusion caused by the conditions under which plaintiff was required to perform this extra-hazardous work in addition to the full demands upon his strength by his ordinary work, constitute a case of either thoughtless, or else callous and reckless, repeated exposure and subjection of this youth to peril, the like of which does not often occur in the reported cases.

Such cases as we cite will be under later headings in this brief.

PLAINTIFF DID NOT, AS A MATTER OF LAW, ASSUME THE RISK OF HIS INJURY, BUT THE QUESTION OF ASSUMED RISK WAS FOR THE JURY.

Counsel for the defendant very properly pointed out that the doctrine of assumption of the risks incident to an employment rests upon the basis of implied contract of the servant to assume them; and that the defense of assumption of risk, is entirely distinct from the defense of contributory negligence.

Choctow O. & G. R. Co. vs. *McDade,* 191 U. S., 64, 68.

With this distinction in mind, we enter upon the inquiry as to the validity of the contention of defendant that plaintiff assumed the risk of the injury sustained by him, as a matter of law, and that the District Court erred in submitting the issue upon the evidence to the jury. We desire to consider the question entirely apart from the distinct defense on the alleged ground of contributory negligence.

The argument for defendant, that plaintiff by his contract of employment, assumed the risk which *when* encountered, and *as* encountered, led to his injury, necessarily implies and proceeds upon the premises, that plaintiff's attempt to mount the push table from the carrying table over this dog roller, was in the line of his employment; that the risk in doing so was incident to the particular act pursuant to the duty in which he was engaged at the time when he received his injury.

This particular contention necessarily concedes, not only that the servant was required by the general terms of his employment, but under the testimony pursuant to what amounted to an express standing direction of the foreman Kilty (Tr., pp. 120, 122, 123) approved and acquiesced in both by the foreman and the general manager (Tr., p. 122) to mount this push table in the precise manner in which he sought to mount it when he was injured, whenever it appeared necessary to do so to release and disengage jams of lumber upon the push table.

It follows, by logical necessity, that the whole argument points that the plaintiff *assumed* in law this specific risk which taken, resulted in his injury, and that it was the exact risk which the employer and employee impliedly agreed with each other should be taken by the employee.

Now all the cases cited by defendant upon this doctrine of assumption of risk of which *Bresette* vs. *E. B. & A. L. S. Co.*, 162 Cal., 74, and *St. Louis Cordage Co.* vs. *Miller,* 126 Fed., 495, 511, *et seq.,* and the cases therein cited, are typical, are cases in which the injuries were received by the employees from the *normal functioning of the machinery* about which the servants were employed. Thus in the Bresette case, an oiler in reaching across moving and unguarded gears had the sleeve of his arm caught in the revolving jams and lost his arm thereby. In the case in the 126 Fed., 495, 511, *et seq., supra,* the plaintiff had her hand crushed in unguarded cog wheels. So with the numerous cases of hands or other members of the body being caught in exposed cog machinery or gearing, or in rollers or pulleys or hashers, or shears, or by set screws in revolving shafts or in die machines, or saws or cutters and the like. All of this class of cases are cases of risks contractually assumed by the injured employee where *there was no negligence on part of the employer.* Hence for the moment, laying aside considerations arising 1st, from the age of the plaintiff; 2nd, from the failure of defendant to give him any warning or instruction; 3rd, from the extra hazardous nature of the requirement, beyond the terms of the original employment, to mount this push table to assist the defective operation of the machinery, and 4th, the considerations respecting the failure of the plaintiff to provide any suitable appliance for mounting this push table, we propose to pursue the specific inquiry here, upon the extremest construction of the testimony in favor of the defendant, bearing upon the extent of the contractual assumption of risk as contended.

We have then the case of employment of plaintiff to mount the "push table" by stepping up onto it from the carrying table whenever a jam of lumber occurred on the push table, which required loosening. What obvious risks

did the plaintiff contract to assume in that employment upon the extremest view of the evidence in favor of the master, divested for the moment of all the qualifying considerations we have mentioned? Such risks are embraced in the following category and we can conceive of no others.

1st. The risk of being struck by timber and lumber, which in all sizes from timbers 8x8 inches to inch boards, was in the operation of the mill being continually precipitated down the skids from the inside of the mill as the witness Coffin described (Tr., p. 216) "very viciously", a statement which is borne out by the grinding and gouging out of the 4-inch guard rail on the east and farther side from the mill of the push table (Tr., pp. 106, 165). Such risk of being struck might be either when the lumber was falling from the skids on the push table, or being carried southward by the rollers in that table.

2nd. The risk of stepping upon any of the rollers revolving in the push table, including the dog-roller and the loss of footing thereby, and so being thrown down on the table.

These, it will be observed, were risks attendant upon the operation of the machinery in delivering and conveying lumber which inevitably confronted any effort to mount the push table by stepping on it from the carrying table.

The discharge of the lumber down the skids and the revolving of the rollers, and the carrying of the lumber by them southward for delivery upon the carrying table, no matter how defectively the machinery was discharging these functions, were all on the line of the offices in the processes of manufacturing lumber which they were designed to perform. It was to aid and supplement their defective operation that the plaintiff was so required to mount the push table.

THE X BOARD.

But neither of these things was the proximate or efficient cause of the plaintiff's injury. There existed an altogether distinct element, which had no place in the economy or functions of this mill and machinery. And that is what is referred to in the testimony as the "X board". This was a board or plank nailed in the frame of the push table, parallel to the dog roller for its whole length, and within about a quarter of an inch of the longest spikes or projections of the dog roller, and within about one inch from the top of the roller, according to McCann (Tr., pp. 137-138), and within three inches of the top of the dog roller according to the witness Diller. The length of the spikes on the dog roller were ⅜ to ¾ of an inch (Tr., p. 176). There is nothing to show that they were sharp. Kilty testified that *"The plank X had no connection with the moving of the lumber. It had no utility whatever in handling the lumber."* (Tr., p. 200.) While he differs with other witnesses as to the time and means of its removal he states that after it was removed *"It was not put back because we had no use for it."* (Tr., p. 200.) "There were not any boards placed back on it after that; that is not while I was there. I stayed more than a year after this accident happened." (Tr., p. 189.)

The witness Diller, who made the model in evidence, testified (Tr., p. 175):

> "If I remember correctly, I made this model about two years ago. When I made the model this plank was not parallel to the dog roller of the mill; I put this in the model because it was there at the time the accident occurred. I tore out the plank or else the man working with me tore it out, I do not remember. Mr. Evenson (the general manager) ordered us to take it out. I think it was the Monday morning perhaps after the accident."

Coffin, witness for defendant, states (Tr., p. 225):

> "Shortly after the accident this plank in front of the roller was knocked out by myself; it was in my mind that way. It was done at nobody's orders. I don't know how long after the accident, but I had no instructions to do it; I knocked it out because *I considered it dangerous.*"

We here refer to this testimony so far as relates to the removal of this X board, all of which was received without objection and by common consent, only to emphasize the fact that it served no function in the work of the mill, that it was entirely extraneous to any such work,—a wholly superfluous thing.

But it was worse than useless and superfluous; it added a new, malign and latent function to the environment of the work required of plaintiff without which it would have been impossible for this injury to have occurred. *It was in view of the service required gross negligence on the part of defendant to maintain it.*

For the injury to him was accomplished not by the free action of the dog roller, but by the X board holding his foot between it and the dog roller, in consequence of which the roller ground and crushed his foot.

> (McCann, Tr., p. 114; Kilty, Tr., p. 188; Coffin, Tr., p. 224.)

Indeed counsel for defendant correctly say that the injury was caused by "his accidentally getting his foot caught between the dog roller and the X board."

If the X board had not been where it was and at the distance it was from the dog roller, the injury in this case could not have occurred; because no possibility of grinding or crushing by the dog roller would have existed.

If the space in the direction in which the roller was revolving had been wholly free and open it would have been impossible for this injury to have been caused.

The X board was in fact placed at such a distance from the roller that the two co-operated to make a most efficient crushing machine; the X board operated as a plate adapted to hold and confine any member of the body which should be thrown against it by the roller, until it was entrapped, drawn in between the two by the roller and subjected to the crushing and grinding process. (Tr., pp. 169, 224.)

This co-ordination of the X board with the rollers created a latent, extraordinary and *extraneous* danger of which co-ordination there can be no pretense that plaintiff knew any thing; and much less any pretense that he either understood, comprehended or appreciated the danger lurking in that combination.

It was said in the opinion of the Supreme Court of California, in bank, in *Bone* vs. *Ophir Silver Mining Co.,* 149 Cal., 293, 294, that:

> "The rule is unquestioned that the duty of informing a servant of latent or extraordinary dangers or risks connected with the service of which the master has knowledge, is not only a duty, but is a primary duty. * * *"

True the court further said:

> "It is to be noted, however, that this rule applies to latent and *extraneous* dangers of which the master himself has knowledge, or, of which, with the exercise of ordinary care, he should have knowledge."

Now the Benson Lumber Company put this X board where it proved its dangerous character; it was an unnecessary and improper thing; it was entirely extraneous to the work of the mill; it created the combination which was the primary, proximate and efficient cause of this injury, with which all other risks of the employment (discussing from the standpoint most favorable to defendant) merely worked in co-operation, but which in and of themselves they could not have accomplished.

Who is responsible for this X board which by reason of the fact of its combination and co-ordination with the dog-roller constituted a veritable man-trap? Is it the defendant who built it or the plaintiff who had not the slightest conception of the danger which lurked in the combination?

It is thus, we submit, clear that this extrinsic element of risk to which the plaintiff was exposed distinguishes this case from all those relied upon by defendant under the defense of contractual assumption of the risk. In those cases there was no negligence imputed to the master. But here the negligent act of the master was the *causa causans of the injury.*

Those cases are, we submit, all of the class of risks arising from the functioning of the machinery in its purposed work. The doctrine of contractual assumption of risks even by an adult servant is confined to the acceptance by him of the *ordinary* risks *incident* to his employment. The reason for the distinction is plain and palpable. For an illustration we take the very case of *Bresette* vs. *E. B. & A. L. Stone Company,* 162 Cal., 74, 78, which counsel for defendant claim to be unable to distinguish from the case at bar. In that case, let it be observed, that the plaintiff was employed to oil the very machinery, in reaching across the moving and unguarded gearing of which the sleeve of his left arm was caught in the revolving gears and his arm injured. Thus he was employed to work with the identical combination of intermeshing cogs in which his arm was caught. His employment to thus attend that machinery necessarily directed his attention to the operation of the normal functioning of the gears in their designed and ordinary working. He could not even begin his work of oiling without of necessity observing such working. The constantly repeated demonstration of its operation was before his eyes at all times when the machinery was doing its intended work. He was there employed to pro-

mote this functioning. And the court properly held that he assumed the risk of danger from the operation of the unguarded gearing.

Let it further be particularly noted that in that case every part of the interoperating gearing was a necessary part of the machine as a whole; it was there to perform its designed and intended office; nothing was superfluous, useless or unnecessary, or the causation of extensive or latent danger, but only of patent risk absolutely incident to and inseparable from the operation of the machine.

Again, let it be observed, that the defendant in that case was by the opinion of the court absolved from any negligence. The plaintiff, an adult, had been employed to work about the unguarded gearing. His contract of employment implied the assumption of the risk in the ordinary operation of the machinery in the condition in which it was. There was therefore no room for the charge of negligence, in that case against the master. For as we shall take the occasion later to point out, a servant is never held to the implication that he *assumes* the risks caused by the master's negligence; hence if under the facts of a given case there is contractual assumption of the risk, the encountering of which led to the injury, there can be no imputation to the master of negligence as responsible for that injury.

Turning now to the case in hand. Under the evidence here there can be not the remotest pretense that the finding implied in the verdict that the X board was the efficient, the proximate and the *sine qua non* cause of this injury, is not only amply supported by the evidence, but that a finding to the contrary would have been against the undisputed evidence.

It must also be taken that the implied finding by the verdict that it was a useless and extraneous intruder upon the push table, which superadded a mischievous and dan-

gerous combination by its relation to the dog roller, and that this dangerous capability was inherent in the combination, but existed lurking for its prey, latent and unobserved, by the employee, is not only justified but made imperative by the evidence. Its malign function was nothing which the employee was hired to further or promote; his employment was not to see objects ground between the X plank and the dog roller. He never had seen it do that sort of thing.

But the employer put it there; and in the words of the Supreme Court of the United States in *Hough* vs. *Texas & P. R. R. Co.,* 100 U. S., 213, 217, the

> "Master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for the use of the latter."

Did the master in this case discharge this duty, by superadding to the push table this X board which constituted the efficient cause of the injury, but contributed nothing to functions of the push table or to further the work for which plaintiff was hired?

Recalling again the hypothesis upon which the argument for the defendant that plaintiff assumed the precise risk of the injury he has sustained, proceeds, to-wit: that plaintiff was hired among his other duties, to mount the push table in the way he sought to mount it, we ask where can any authority be found for the proposition, that the servant contracted to assume the risk of this mantrap in addition to the risks incident to the operation of the machinery in the line of its proper functions of delivering lumber? Such a proposition would be equivalent to the claim that the servant impliedly contracted to exonerate the master from the consequences of his tortious negligence.

Or where can a respectable authority be found which declares that under such circumstances it is so clear that the servant assumed this extraneous risk that the jury should have been directed to find for the defendant, or that the appellate court should reverse the judgment for plaintiff on the ground that as a matter of law he *assumed* that extraneous risk?

We agree with counsel (brief, p. 54) so far forth that "whether plaintiff's foot *was caught,* by his making a misstep or being struck by lumber is immaterial."

For we submit that whether his foot was brought into contact with the roller by a misstep or by being borne down on it by descending lumber, it was not that contact that was the proximate cause of the injury. True it may be that he lost his footing by his foot being carried out from under him by the roller since he was thrown down, face forward, his full length upon the push table. (Coffin, Tr., p. 224.) But this fall caused him no serious injury. (Tr., p. 111.) It was not the fact, if fact it was, that lumber struck his foot that caused the injury, for the impact of the lumber upon his foot did him no harm. He says (Tr., p. 111): "I did not receive any other serious injuries outside of my foot; it was just my foot that *got caught.*" *It was the being caught which did the mischief.* This, however, could not possibly have occurred but for the placing by defendant of the X board where it was; this and this alone was the true proximate cause.

The argument for defendant as to assumption of the risk is that the misstep by which the foot struck the roller, or the striking of lumber upon the foot bearing it down into contact with the roller were in the nature of inevitable accident, or an inanimate thing contributing to bring the foot in contact with the roller. But it was not the roller by itself which did or could hold the foot subject to

its operation. It was the superadded and foreign element of the X board which held the foot to be crushed and mangled. This was the efficient and proximate cause and made the latent combination and the lurking danger which inflicted the injury.

We here note that the court gave in its instruction No. XI (Tr., p. 242) the identical instruction as to proximate cause No. VIII requested by defendant. Therefore all the assignments of error based upon the supposition that this instruction was not given (see Tr., pp. 256-257; Brief, p. 23) and the argument made upon that supposition, (Brief, pp. 85-88) are the result of the misconception.

Under this instruction and the evidence proving beyond doubt that but for this X board the injury could not have occurred, the jury were justified in finding that the negligence of the defendant in maintaining this unnecessary, and in view of the service required of plaintiff, dangerous extraneous combination, was the proximate cause. And we submit that the evidence was properly submitted to the jury.

The misstep or the bearing down of lumber, whichever the case may be, which brought the foot upon the roller, were antecedent occurrences, to the grinding of the foot against the X board.

Defendant virtually says in making this defense of assumption of the risk from which the injury was sustained:

> "Plaintiff agreed to take the chances of the misstep, or of the descending lumber, bringing his foot in contact with the roller, because the revolving roller and the descending lumber were inseparable incidents of the business about which plaintiff was employed; his employment called for his mounting on the push table over the roller and in face of descending lumber, upon this particular occasion. Therefore the injury was the result of pure accident, the risk of

which was assumed and the court should have directed a verdict for defendant."

But as was said in the case of The Joseph B. Thomas, 81 Fed., 578, 584:

> "It is well settled that it is no defense in an action for a negligent injury that the negligence of a third person, or an inevitable accident, or an inanimate thing contributed to cause the injury of plaintiff, if the negligence of the plaintiff was the efficient cause of the injury."

In *Pullman Palace Car Co.* vs. *Laack,* 143 Ill., 245, 32 N. E., 285, 291, there is quoted with approval from Bishop on Non-Contract Law, the following:

> "A person contributing to a tort, where his fellow contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help."

The court further said in that case, p. 291:

> "It is well settled that where the injury is the result of the negligence of the defendant and that of a third person, or of defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury."

As put in *Scandell* vs. *Columbia Construction Co.,* 64 N. Y. Supp., 232:

> "Where the evidence was sufficient to support a finding that the negligence alleged was the proximate cause of an injury to a servant, *without which the injury* could not have occurred, it was error not to submit the case to the jury, though another defect was also a proximate cause of such injury." (Italics ours.)

Here, however, as already remarked, neither the misstep nor the descending lumber can be regarded as contributing proximately to the injury, but were strictly an-

tecedent links in the sequence of occurrences; the final and efficient cause was the X board.

The injury as we have abundantly insisted would have been impossible but for the X board; and that had no business there; but the fact remains that the master put it there. The combination which it effected with the dog roller was the negligent act of defendant; and since this combination had no utility or proper function in the mill, the risk from it we submit was not assumed.

When the case of *Sanborn* vs. *Madero Flume etc., Co.,* 70 Cal., 261, which is sought to be distinguished from the case at bar, is compared with it, we submit that this is a far clearer case of *non assumption* of risk than that. There the plaintiff was injured by the fact that a defective substitute for a sword the purpose of which was to enter the cut made in a log by the saw, failed to do its designed work. There "notwithstanding the sword was obviously insufficient and known by the plaintiff to be unsafe," the court held that whether the plaintiff assumed the risk and was negligent was a question for the jury.

There it will be seen that what caused the injury was what occurred in the very work for which the plaintiff was employed and in operation of one of the functions and appliances of that work; this function was defectively discharged, because of the defective substitute for the sword, and the injury resulted.

In short there was present the element of negligence on part of the employer.

The court held that the risk was not assumed, although the servant knew the defective instrumentality; saying, in substance that was not enough unless he also understood the risk to which it exposed him.

But if it be the law, as held in that case, that where a servant, working about defective machinery, knows the

defects in the instruments provided for its proper work, but does not understand the risk from them, he is not to be held to assume that risk as a matter of law, then *a fortiori* it must be true, that there can be no assumption of a risk created by the master wholly extraneous and collateral to any function of the machinery to work about which the servant is employed, but yet so connected with such machinery that the servant is exposed to it while in the line of his duty.

There is absolutely no evidence here that before this casualty McCann or any of his co-employees understand or appreciated the danger in this X board; it was not until after the occurrence showed its dangerous character that his co-employee knocked it out because it was dangerous (Tr., p. 225) under the order of Evenson the Superintendent (Tr., p. 175).

Indeed since it had no function in the mill, the law will not imply an assumption of the risks which it created; for an employee only assumes such risks as are *incident* to the employment. The italicised portions of extracts from opinions quoted are ours unless otherwise indicated.

In *Baxter* vs. *Roberts,* 44 Cal., 187, 192, it was said:

> "That one contracting to perform labor or render service thereby takes upon himself such risks and only such risks as are necessarily and usually incident to the employment is well settled. * * *
>
> "Nor is there any doubt that if the employer had knowledge or information showing that the particular employment is from *extraneous* causes known to him to be hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employee to be, he is bound to inform the latter."

A recent case in point upon the negligence of defendant because of the maintenance of this unnecessary X board, is the case of *Schellin* vs. *North Alaska Salmon Co.*, Jan-

uary 16, 1914, in the Supreme Court of California, 47 Cal. Dec., p. 138, 140-141.

In that case the plaintiff was injured by a set screw on a shafting. The following is from the opinion of the court:

> *"The collar and set screw performed no functions.* Their presence at that place made it one of great danger to plaintiff, and it was defendant's duty to make and maintain there as safe a place as reasonably was possible;"

citing *Kreigh* vs. *Westinghouse C. K. Co.,* 214 U. S., 256; *Jacobson* vs. *Oakland Meat, etc., Co.,* 161 Cal., 432, and cases in them cited.

In the case in 214 U. S., 249, 259, *supra,* it was pithily said, citing the McDade case, 191 U. S., 64, 66,

> *"There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."*

It was also said in the case last cited (p. 256) quoting from *Santa Fe & P. R. Co.* vs. *Holmes,* 202 U. S., 438, respecting the duty of the master to provide a reasonably safe place for the carrying on of the work, the following:

> "The duty is a continuing one and must be exercised whenever the circumstances demand it."

The cited case of *Chocktaw O. & G. Co.* vs. *McDade,* 191 U. S., 64, 66, is also in point as to this X board. It was said of the spout which caused the injury:

> "As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them by night and day, to pass the structure. *It is a case where the dangerous structure is not justified by the necessity of the situation,* and we agree with the judgment in the court below that its maintenance under the circumstances was negligence upon the part of the railroad company."

In *Skelton* vs. *Pacific Lumber Co.,* 140 Cal., 507, 510, it was said:

> "A servant, of course, takes upon himself all the ordinary risks and perils of accident *in the common course of the service in which he is engaged.*"
>
> "The servant assumes the risk of every danger belonging to the work itself; *but if the master's negligence aggravates such danger,* and the servant is injured thereby, he may recover."
>
> *North* vs. *Dowling,* 93 Mo. App., 156.

Upon this point the case of *Naudau* vs. *White River Lumber Co.,* 76 Wis., 120, is a clear authority valuable for its correct discrimination between contractual assumption of risk, and what is sometimes termed in the opinions assumption of risk when what is meant is contributory negligence, extending where there is fool-hardiness or recklessness on part of the employee to subjection to the maxim *volenti non fit injuria.*

We quote from the opinion, the whole of which is worthy of consideration as an aid to the proper disposition of this case the following passage, from page 131 of said opinion:

> "The learned counsel for the defendant also contend that the presumption is that the plaintiff assumed all the dangers incident to his employment, and therefore the burden of proof was upon him to show that he did not know of the danger connected with this uncovered gear. We think in this the learned counsel are in error. The employee is only presumed to assume the dangers usually attendant upon his employment; and, when he shows that he has been injured by a cause or danger not usually or reasonably attendant upon his employment, he is then entitled to recover, unless it be shown that he knew of such unusual and unreasonable danger, and fully comprehended its nature, at the time of his employment or before the accident happened. The evidence in this case having established the fact that the injury to the plaintiff was caused by a danger which ought not to

> have attended his employment, and would not have attended it if the defendant had performed its whole duty towards him, there is no presumption that the plaintiff assumed the unusual risk, and the burden of proof is on the defendant to show affirmatively that he did, to the same extent that it is on the defendant to show any other contributory negligence on the part of the plaintiff. The assumption of an unusual risk in any employment by the employee is in the nature of negligence on his part, which, like any other contributory negligence, prevents his recovery."

In *Hough* vs. *R. R. Co.,* 100 U. S., 213, 217, the court dealt with the doctrine of contractual assumption of risk implied in the contract of employment. The court said, page 217:

> "It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages in for compensation."

The court further said:

> "But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. * * * His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant in legal contemplation is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or their preservation or maintenance in suitable condition after they have been supplied by the master."

That the contractual assumption of risk excludes the idea of negligence on the part of the master which contributed to the injury, is shown by the following extract from the opinion in *Chicago M. & St. P. Ry. Co.* vs *Ross,* 112 U. S., 377, 383:

"But however this may be, it is indispensible to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption he must not himself be guilty of contributory negligence."

So it is said in *Pantzar* vs. *Tilly Foster Iron Mining Co.,* 99 N. Y., 368, 376:

"The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is these risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes."

See also upon this subject, *McGovern* vs. *C. V. R. R. Co.,* 123 N. Y., 280, 287, where it is said:

"It may, we think, be laid down as a general rule, that the dangers connected with such a business, which are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment and are assumed by those who consent to accept employment under such circumstances. But those dangers, which are known and can be mitigated or avoided by the exercise of reasonable care and precaution on the part of those carrying on the business, and injuries from which happen through neglect to exercise such care, are not incident to the business, and the master is generally liable for damages occurring therefrom."

That the doctrine of contractual assumption of risks does not apply to such an extraneous risk as that occasioned by this X board, follows from the statement in the

opinion of the Supreme Court of Massachusetts, in *Murch* vs. *Thomas Wilson Sons & Co., Ltd.*, 168 Mass., 408, 47 N. E., 111, 112, as follows:

> "The employee impliedly agrees to assume all the obvious risks of the business in which he contracts to work. Among these are the open, manifest dangers attendant upon the use of the ways, works and machinery *of permanent character that are plainly intended to be retained as part of the plant to which the contract for service relates.*"

Labatt on Master and Servant, 2nd Ed., Sec. 894, p. 2386, contains the following statement:

> "894. (2) RISKS RESULTING FROM THE MASTER'S NEGLIGENCE ARE NOT ASSUMED BY THE SERVANT.—A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, *prima facie,* a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties."

It was said in this Circuit, in *Bunker Hill & Sullivan Min. & C. Co.* vs. *Jones,* 130 Fed., 813, 818:

> "While it is a ruling principle that a person entering voluntarily into a contract of hiring assumes all the risks and hazards ordinarily incident to the employment, and liable to arise from the defects which are patent and obvious to a person of his experience and understanding, it is equally true that risks arising out of the negligence of the master are not those ordinarily incident to the employment, and are not, therefore, assumed by the servant. *Texas, etc., R. R. Co.* vs. *Archibald,* 170 U. S., 665, 18 Sup. Ct., 777, 42 L. Ed., 1188."

To the same effect is *San Francisco & F. S. S. Co.* vs. *Carlson*, 161 Fed. 851, 854, in this circuit.

We submit that there was here no implied covenant on part of plaintiff in his contract of employment to hold defendant harmless for its negligence in maintaining this useless X board in a place where it co-operated with the dog-roller to create the man trap which first revealed its capacity to injure when it caught plaintiff's foot.

There was no contractual assumption of the risk from this latent and feline danger occasioned by the negligence of the master.

In *Hawley* vs. *Chicago, B. & Q. Ry. Co.*, Circuit Court of Appeals, 7th Circuit, 133 Fed., 150, the plaintiff's decedent was killed by being struck by the projection over the railroad track of defendant of a roof of a building maintained by the defendant. One of the defenses was assumption of risk. After quoting from *Hough* vs. *R. Co.*, 100 U. S., 213, *supra*, the court said:

> "From the above quoted declaration of the Supreme Court in *Hough* vs. *Ry. Co.*, it is very clear that decedent on entering the service did not assume the danger from the roof corner that projected over the track as needlessly as a pipe or bayonet."

We submit that a similar statement would be proper with respect to this X board.

AS TO THE FURTHER AND CONCURRING ELEMENTS OF THE EMPLOYER'S NEGLIGENCE.

We have thus far argued the question of the propriety of the submission to the jury of the question of contractual assumption of risk, commenting only on the single feature of the master's negligence, consisting in his requiring the servant to mount the push-table from the dog-roller with which the X-board made the combination extraneous to any function of the mill, which combination was the efficient

and proximate cause of the injury complained of. Before further examining the defenses which proceed upon the concession of negligence upon the part of the defendant corporation, it seems proper to refer to the elements of the master's negligence which concurred with the negligent act of maintaining this X board.

They are, first, that under the finding implied in the verdict that defendant knew when it employed plaintiff that he was a boy 17 years of age and inexperienced; that his contract with defendant was to load lumber on push-carts after it had been delivered within his reach by the machinery of the mill, while working on the loading platform. That because of the defective functioning of the newly installed push-table and carrier-table, they frequently failed to work automatically as designed, for which reason it developed after the employment that jams and clogging of lumber occurred on these tables, that required to be released by mounting the table to disengage, by hand, the accumulations and jams of lumber.

That no suitable or proper appliances were furnished by defendant for mounting the push-table.

That defendant gave plaintiff a standing order to mount the push-table when it appeared necessary to release such jams and help out the functioning of the machinery and left him to mount the push-table in any way he could. That the surface of this push table was 5 feet 7 inches above the level of the loading platform, on which plaintiff contracted to do his work.

That appellant gave him no instructions how to mount or any warning of any danger in any method of so doing.

That it knew that the quickest and most ready means of mounting the push-table was to step upon the carrying-table from the loading platform by means of a step provided between it and the push-table, and from thence over the

dog-roller on the push-table, and that when early in the service plaintiff was ordered by the foreman to mount the push-table, this was the method pursued by plaintiff, as was then seen by the foreman who gave the order; that both the foreman and the superintendent of the mill frequently saw him mount in this way, but at no time gave him any advice, instruction or warning against so doing.

All these facts considered in connection with the maintenance of the X-board, did the court err in refusing to hold as a matter of law that the plaintiff in any sense contracted, or otherwise, assumed the injury from the risks so encountered? Or as a matter of law, under all the circumstances, ought the court to have directed a verdict for defendant and refused to submit the issues upon the alleged defenses to the jury?

> *Merrifeld* vs. *Maryland Co.*, 143 Cal., 54; *Roth* vs. *Northern Pacific Lumbering Co.*, 18 Ore., 205, 22 Pac. Rep., 842.

The known youth and inexperience of plaintiff is an important element. It is admitted in defendant's brief that the instructions upon the duty of the master to warn and instruct given by the court (Tr., p. 270), states the law correctly; it is claimed that it was inapplicable, on the ground that there was no evidence on which to base the instructions. That there was such evidence, we have pointed out.

This instruction is most amply supported by the decisions of the courts of this state, among which are:

> *Ingerman* vs. *Moore*, 90 Cal., 410, 421-422;
> *Foley* vs. *California Horseshoe Co.*, 115 Cal., 184;
> *O'Connor* vs. *Golden Gate, etc., Co.*, 135 Cal., 517, 543-546;
> *Verdelli* vs. *Gray's Harbor, etc., Co.*, 115 Cal., 517, 523-525;

Mansfield vs. *Eagle Box, etc., Co.*, 136 Cal., 622, 624-626;
Jenson vs. *Mill & Fink Co.*, 150 Cal., 500, 506-509;
Quinn vs. *Electric Laundry Co.*, 155 Cal., 500, 506-509;
Larsen vs. *Bloemer*, 156 Cal., 752, 757-8;
Clark vs. *Tulare Dredge Co.*, 14 Cal. App., 415, 430-431;
O'Connell vs. *United Railroads*, 19 Cal. App., 36, 50-51;
Jones vs. *Florence Mining Co.*, 66 Wis., 277, cited in 90 Cal., 422.

But not only was there no semblance of care on part of the master to warn or instruct, but there was here an express order to this youth to mount this push-table, to disengage a jam, which was done in sight of the foreman and pursuant to his order; the youth was then given to understand that this was a continuous service demanded of him, as was in fact required. Then, too, it was an extra-hazardous service in addition to the employment for which he hired, and not a slight, but most inherently dangerous addition even without the presence of the X-board.

The instruction Number VIII given by the court adopted from that given in *Jones* vs. *Florence Mining Co.*, 66 Wis., 277, in the case of *Ingerman* vs. *Moore*, 90 Cal., 410, *supra*, has been since consistently followed in the cases above cited. And in the case of *O'Connell* vs. *United Railroads*, 19 Cal. App., *supra*, in quoting this oft approved instruction, the court italicized the following words therein: *"even with his own consent."*

So that the fact shown by the evidence in this case, that the plaintiff willingly did what he was ordered to do and that he often followed the order without injury, does not relieve the defendant of liability, nor did it impose upon the court the duty to direct a verdict for the defendant.

Upon this subject what the court said in its opinion in *Foley* vs. *California Horseshoe Co.,* 115 Cal., 184, *supra,* makes a sufficient answer to the argument for the defendant herein that the court erred in the submission of the case to the jury, and in not directing a verdict for the defendant. See *ibid,* pp. 190-193.

In speaking of the youth of an employee, the court said among other things:

> "In the factory or shop unquestioned obedience is expected and exacted. They must go where they are sent, they must do as they are told.
>
> "It would be barbarous to hold them in the same accountability as is held the adult employee who is an independent free agent. Their conduct is to be judged in accordance with the limited knowledge, experience, and judgment which they possess when called upon to act. And it must, from the nature of the case, be a question of fact for the jury rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinarily prudent person placed in the same position."

The court quotes with approval the following from *Turner* vs. *Norfolk Ry. Co.*, 40 W. Va., 675:

> "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands, and pay deference to the judgment of his elders, until legally emancipated at the age of twenty-one years. And it would be an extreme case in which a minor should be held guilty of contributory negligence in

obeying the orders of his foreman, representing his master."

The Foley case is also instructive upon the bearing of the fact that this intrinsically dangerous work was required of plaintiff outside of the regular duties to perform which he was employed.

When in addition to all these elements of the sum total of defendant's negligence, there is considered the fact that it made no provision whatever for an appliance appropriate or otherwise, to mount the push-table, either over the revolving shaft, on the east side, or over the dog-roller, on the south side, to the choice between which approaches plaintiff was shut up and between which there was a choice to mount over the cart only when the load on it was "just right", we submit that the court did not err in holding that it could not as a matter of law hold that the defendant either assumed by his contract the risk of the injury he sustained, or that he was guilty of contributory negligence.

The familiar rule by which the courts govern themselves in that regard, has been reiterated by the Supreme Court in the case of *Kreigh* vs. *Westinghouse C. K. & Co.*, 214 U. S., 249, 258, as follows:

> "Questions of negligence do not become questions of law, to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.' *Gardner* vs. *Michigan C. R. Co.*, 150 U. S., 349, 361, 32 L. Ed., 1107, 1110, 14 Sup. Ct. Rep., 140."

In this connection we refer to the fact that Evenson, superintendent of the mill, who first employed the plaintiff, and who verified the amended answer of the defendant, and had the model of the mill in evidence constructed, and

must have assisted in framing the defense, and was therefore the most important witness for the defendant, was not called, nor the absence of his testimony accounted for. The fact that the proof is so far from supporting the answers verified by him makes the absence of the evidence of this chief witness an additional circumstance properly to be considered by the court as to whether the court ought to have submitted the case to the jury.

The Joseph B. Thomas, 81 Fed., 578, 584.

THE SECONDARY USE OF THE TERM "ASSUMPTION OF RISK" TO DESIGNATE A DEFENSE AGAINST RESPONSIBILITY OF THE MASTER FOR INJURIES TO THE SERVANT ARISING OUT OF THE MASTER'S NEGLIGENCE.

We do not overlook the fact that a vast body of case law has developed the doctrine of assumption by the servant of risks occasioned by the master's negligence. This secondary use of the term is altogether distinct from the use of the term to designate the assumption by the servant under his contract of hiring of the ordinary risks attending his employment.

In the cases when the latter and primary use of the term is proper, there is no negligence attributable to the master. Such are the cases relied upon in the brief for defendant.

But the secondary use of the term always presupposes negligence on part of the master as a contributing cause to the servant's injury which makes him *prima facie* liable; and this *prima facie* liability he may rebut by assuming the burden of showing what has been termed the "assumption" by the servant of the risk of danger brought about by the master's negligence.

There is an inherent conflict between the doctrine of the duty of the master to use ordinary care to provide a safe place and safe appliance for the prevention of the servant's

work, and this secondary doctrine of assumption by the servant of risks caused by the failure of the master to perform his duty. (See 3 Labatt on Master & Servant, 2nd Ed., sec. 893). Accordingly a great variety of theories of the nature of this secondary sort of assumption is exhibited by the decisions.

Some go upon the theory that the contract of hiring carries with it the implied agreement that the servant will abide all the risks of the master's negligence of which he becomes sufficiently advised in the progress of the work; others go upon a theory of public policy; others go upon the theory that by continuing the work with knowledge of the danger occasioned by the master's negligence, the servant impliedly agrees to waive any claim for injuries sustained in consequence of such negligence; others that where the danger is entirely obvious the servant by braving the danger becomes subject to the operation of the doctrine *volenti non fit injuria.* And others as in the Wisconsin case in 76 Wis., 120, *supra,* put such defense upon the ground of contributory negligence.

THE DEFENSE HERE ONE OF CONFESSION AND AVOIDANCE.

It is plain that this secondary doctrine of assumption of the risk caused by the master's negligence, is that upon which defendants rely. But the authorities cited by them are applicable only to the primary doctrine of the assumption of risk in which the defense goes upon the theory that there was no negligence on part of the master, and have no application to the defense of this secondary assumption.

The defense argued here is one of confession and avoidance, not of denial of the negligence of defendant.

It is unnecessary to discuss at length as to what is the true theory of this secondary assumption of risk as a defense by way of confession and avoidance.

What is of immediate practical importance is the dominant fact that Section 1970 of the Civil Code of this State as amended and in effect March 6, 1907, (Stat. 1907, p. 119), *sets a definite bound to the scope of this defense of confession and avoidance.*

THE IMMEDIATE PRACTICAL IMPORTANCE OF THE AMENDED SECTION 1970, CIVIL CODE.

We next undertake to examine what this bound is, and submit that in refusing to direct a verdict for defendant, and in framing its instructions and submitting the case to the jury, the court but obeyed that statute, as well as followed the general law applicable to the case.

THE BEARING UPON THE CASE OF SECTION 1970, CIVIL CODE, AS AMENDED MARCH 6, 1907.

We have set out this statute as amended in an appendix to this brief, and have caused to be enclosed in brackets the addition made by the amendment to the original section 1970 of the Civil Code. The original section, ending with the words "culpable employee" in the first paragraph remained. The remainder of this statute as it now stands, constitutes the amendment.

Counsel for the defendant contend that the amendment in no wise changes or modifies the law upon the subject of assumed risk or of contributory negligence; and in support of the contention quote largely from the case of *Hall* vs. *Clark,* 163 Cal., 392. In that case assumption of risk was not a defense alleged. The statement of the defense as given in the opinion, page 393, is as follows:

> "The answer of the defendant denied the allegations of the complaint *and set up the defense of contributory negligence.*"

What is said in the opinion is to be construed as addressed to the issue of contributory negligence. That it

was correctly decided under the amended section 1970 cannot be questioned. But it was so decided because

> "No ordinarily prudent person of similar age and experience, situated as was the employee, would have done the act even though ordered by his employer to do it." (*Ibid*, p. 396.)

In other words, an experienced teamster, twenty-six years of age, who in compliance with the direction of the foreman, deliberately drove his team over a bank into an excavation, was guilty of contributory negligence. Indeed, that is what the court explicitly held (*Ibid,* p. 397), where it said of the admitted facts:

> "They are such as to require the conclusion as matter of law, that the plaintiff was guilty of contributory negligence in obeying the order that he testified was given him by the foreman."

The case, therefore, is not one involving the assumption of risk in either of the senses in which that term has been used. We submit that the facts in that case and in the case of *Limberg* vs. *Glenwood Lumber Co.,* 127 Cal., 598, decided before the statute of 1907, are so dissimilar to the facts in the case at bar, that they are no authority for the proposition that either the assumption of risk or contributory negligence were so clearly established in this case as to become a matter of law.

Returning to the consideration of the amended section 1970, the second paragraph of the section is as follows:

> "Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and

thereafter consented to use the same, or continued in the use thereof."

The fourth and fifth paragraphs are as follows:

"Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative of any right or remedy to which he is now entitled under the laws of this state.

"The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed."

It will be thus observed, that not only does the said second paragraph confine the bar to recovery to cases where the employee has full actual understanding, comprehension and appreciation of the dangers by reason of the negligence of the employer in furnishing the defective machinery, ways, appliances or structures, and thereafter consents to use the same or continues in the use thereof, but the fourth paragraph declares that any *implied* contract or agreement by any such employee to waive the benefit of the section or any part thereof shall be null and void.

It thus precludes in the most positive manner the very element which counsel insist in their brief should have been embodied in instructions V, VI, VII, VIII and in other instructions in the record, as to which there is no insistance in argument. In other words, defendant insists that notwithstanding the statute, the test of a servant's right to recover is *whether he ought to have fully understood, comprehended and appreciated the danger in question by the use of ordinary care,* and not *whether he did in fact understand, comprehend or appreciate,* as the statute provides.

What counsel insist upon is that the servant is held by virtue of what is implied in this contract, to *constructive* understanding, comprehension and appreciation of the danger caused by the master's negligence, even though there is entire absence of *actual* understanding, comprehension and appreciation.

But when do counsel claim that such *constructive* understanding, comprehension and appreciation becomes chargeable to the servant? They answer, when by the exercise of ordinary care to discover the master's negligence and the danger consequent upon it he might have derived a full understanding, comprehension and appreciation of such danger. But we submit that the requirement of constructive understanding, comprehension and appreciation is precisely what the statute precludes. It rejects the doctrine that it is incumbent upon the servant to use ordinary care to learn the master's negligence and the consequent dangers in its train. We submit that what counsel insist on as error, in that the court did not introduce into the instructions V, VI, VII, VIII or any other instruction given, language of the purport in the italicized words taken from the exception to said instruction VI (Tr., p. 237) as the illustration of what is insisted upon in the exceptions to all the said instructions, would have been error if it had been embodied as insisted. The illustrative quotation is as follows:

> "The servant not only assumed the risk of working with unsafe machinery in an unsafe place, which he fully understood, comprehended and appreciated the dangers incident thereto, *but also assumed the risk of working with defective and dangerous machinery where he would have fully understood, comprehended and appreciated the danger incident thereto if he had exercised ordinary care and caution.*"

Or, as put in the exception to instruction VII (Tr., p. 238) which demands the qualification of the language of the statute itself, by introducing the following:

> "A servant assumed the risk of the danger incident to working about defective or unsafe ways, machinery, appliances or structures *which the servant should have fully understood, comprehended and appreciated if he had exercised ordinary care.*"

The exceptions to instructions V (Tr., p. 236), VIII (Tr., p. 239), XVI (Tr., p. 246), XVII (Tr., p. 247), and XVIII (Tr., p. 249) are similar.

We submit that, however it may be in other jurisdictions, neither this statute, nor the decisions of the courts of last resort in this state, nor of the United States Circuit Court of Appeals for this circuit, nor the decisions of the Supreme Court of the United States tolerate the doctrine that it is incumbent upon the servant to use ordinary care to discover dangers and perils occasioned by the master's negligence. There can be no question but that the second paragraph of the section 1970 means that knowledge of the defective or unsafe character or condition of the machinery, ways, appliances or structures of the employee shall not be a bar to recovery, unless it shall also appear that the employee *in fact* fully understood, comprehended and appreciated the dangers, and thereafter consented to use the same or continued to use.

Nor can there be any question but that the penultimate fourth paragraph of the said section declares all implied agreements to waive the benefits of any part of the section to be null and void. Among these benefits certainly is the provision that only actual and not implied or constructive understanding, comprehension and appreciation shall bar recovery.

In *Silveira* vs. *Iversen*, 128 Cal., 187, 192, the court said:

> "If possible, it would have been still worse had the court given the instruction that plaintiff could not recover unless defendant knew, or ought to have known, of the defect, and the plaintiff had not equal means of knowledge. *The employee is not required to use any degree of care or diligence to discover defects.* He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known or simply refused to open his eyes and see; or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness to neglect."

See *Bunker Hill & Sullivan Min. Co.* vs. *Jones,* 130 Fed., 813, as to the holding in this circuit.

In *Choctaw O. & G. R. Co.* vs. *McDade,* 191 U. S., 64, the opinion states, p. 67:

> "The court left to the jury the question of assumption of risk upon the part of McDade, with instructions which did not prevent of recovery if he either knew of the danger of collision with the water spout, *or by the observance of ordinary care ought to have known of it."*

The court said with respect to this:

> "The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required as it exonerated the railroad from fault if, *in the exercise of ordinary care,* McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee;" citing *Texas & P. R. Co.* vs. *Archibald,* 170 U. S., 665.

In that case the Supreme Court approved the striking out from two instructions the words in one *"by the exercise of ordinary care could have known,"* and in the other *"or could have known by the exercise of ordinary care."* (170 U. S., 665, 671.)

The discussion of the matter is full and instructive, *ibid,* 671-674. In course thereof, the court cites with approval the case of *Missouri Pac. Ry. Co.* vs. *Lemberg,* 75 Tex., 67.

AS TO THE BEARING OF THE STATUTE ON THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

In the last paragraph of the amended section 1970 it is provided that:

> "The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, *except in so far as the same are herein modified or changed.*"

The case of *Hall* vs. *Clark,* 163 Cal., 392, was a case of such gross and flagrant negligence on part of the plaintiff that the court felt bound to say, as a legal conclusion, that the employee did fully understand, comprehend and appreciate the excavation. That case, however, is no authority for the proposition that where the defense is confession of negligence by the master and his counter plea in avoidance of contributory negligence on the part of the servant, that the jury should be instructed that it was the servant's duty to exercise ordinary care to search out and obtain a full understanding, comprehension and appreciation of the danger arising from the master's negligence, particularly in a case like this where the proximate cause of the injury was an extraneous thing like this X board, which was not an appliance or instrument which the servant was himself engaged in using. See the pregnant reference to this subject in the opinion of the court in *Texas & Pac. Ry. Co.* vs. *Archibald,* 170 U. S., *supra,* at page 674.

In what the court said, at the bottom of page 672, it is to be inferred that the nature of the defense in such cases based on consent of the employee to use or continue in

using defective appliances where the dangers from the use is fully understood, comprehended and appreciated, is by it considered to be contributory negligence rather than assumption of the risk in the primary and true sense of the term. In this respect the view of the court seems to approach that of the Wisconsin court as expressed in *Nadau* vs. *White R. Lumber Co.*, 76 Wis., 120, *supra.*

We submit that the court did not err in excluding from instructions given, numbers V, VI, VII and VIII, insisted upon in the argument, or from any other instructions, the statement that it was incumbent upon plaintiff to exercise ordinary care to discover the dangers resulting from the master's negligence.

CONCERNING THE DEFENDANT'S EXCEPTIONS TO INSTRUCTIONS.

1. The giving of the instruction number V (Tr., p. 233-234) was excepted to at the trial, and said exception is insisted upon in argument. So far as that exception rested upon the fact that there was not embodied therein a statement that the servant assumed the risk of all negligence of the master which he should by the exercise of ordinary care on his part have known, fully comprehended, understood and appreciated, it has already been discussed. As to the objection that this instruction should have embodied matter which is contained in the next instruction, number VI (Tr., p. 236-237), it is sufficient to say that it is not required to state the whole law of the case in a single instruction.

2. No exception was taken at the trial to instruction number VI, except on the ground that it did not embody the proposition that the employee is bound to use ordinary care and caution to understand, comprehend and appreciate the danger consequent upon the master's negligence. This we have also discussed.

3. The exception to instruction VII insisting upon the same vice, that it was incumbent upon the servant to exercise ordinary care to understand, comprehend and appreciate the risk and danger arising from the master's negligence, we submit on what has heretofore been said. We also submit that the exception at the trial was confined to that particular exception, and therefore if there were any substance in the objection to the statement in instruction VII, that the statute applied to the consideration of the entire evidence in its bearing upon all the issues in the action, no such exception was taken at the trial, and the same is not available now.

But we may point out that inasmuch as one of the charges of negligence in the complaint is of failure to warn and instruct the plaintiff, a minor, as to the risks incurred, and as this has a direct bearing upon the question of the understanding, comprehension and appreciation of the danger and so upon the question of the assumption of the risks arising from the master's negligence and also upon the defense of contributory negligence, there can be no possible error or prejudice to defendant in the statement of the court that the statute may be considered in its bearing upon all the issues in the case. We submit that there was no error in this instruction.

4. The exception to instruction number VIII (Tr., pp., 238-240) is based upon two grounds, first: that it limited the jury to inquiries of the actual understanding, comprehension and appreciation and did not include a direction to the jury to inquire whether the plaintiff should have fully understood, comprehended and appreciated the danger if he had exercised ordinary care; second, that there was no evidence to warrant the second paragraph of the instruction.

Both these elements we have already sufficiently discussed. The brief admits that the instruction states the cor-

rect rule of law which the authorities we have hereinbefore set out amply demonstrate. We submit that there was ample evidence to warrant the giving of said instruction.

5. As to the exception to the refusal of the court to give instruction VI requested by the defendant (Tr., pp. 254-255), we submit that the substance thereof is included in the instruction number X given (Tr., pp. 241-242) to which no exception was taken.

We further submit that the instruction X given is more favorable to the defendant than the requested instruction VI not given.

6. The statement that the court refused to give the instruction VIII requested by the defendant (Tr., pp. 256-257) and argued in the brief, pp. 85-88, rests upon an entire misapprehension, as the identical instruction was given in number XI (Tr., p. 242).

7. As to the exception that the refusal of the court to give the requested instruction XI (Tr., p. 259), we submit that said proposed instruction assumes as a fact that the method of mounting the push table by climbing upon it by means of lumber buggies was a safe way, and that it merely submits the question whether plaintiff had knowledge of what the instruction alleges to be the fact that climbing up over the buggies was a safe way; and later on in this instruction it is even assumed that the plaintiff knew as a fact that the alternate way of climbing up upon the push table over the buggies was known by him to be safe. In all these respects it would have been an invasion of the province of the jury.

The instruction is objectionable further, because there is no evidence in the record tending to show that the condition of the load or part of a load of lumber upon a lumber buggy at the time that the injury was sustained was, in the

phrase of both the plaintiff and witness for the defendant Kilty, "Just right" to make it feasible to mount the push table over the buggy. This matter we have heretofore discussed.

We submit that the court did not err in refusing to give this requested instruction XI, and that the whole matter is properly covered by the instructions numbers X (Tr., pp. 241-242), XIII (Tr., pp. 243-244), XVI (Tr., p. 246) and XVIII (Tr., p. 248).

No other exceptions to the giving or refusing of instructions than those above noticed are assigned in the brief or argued. We therefore are, we take it, not called upon to argue as to those not insisted upon.

CONCLUSION.

When this employer who, by what amounted to compulsion, subjected a youth of 17 years day after day, to risk life and limb outside of and in addition to the strenuous regular work for which he was engaged, by requiring him to mount upon a push table but four feet wide upon which all kinds of lumber, the major portion of the product of a sawmill, was being precipitated by the propulsive force of machinery adding to the force of gravity, to relieve by his hands the clogging and jamming of lumber caused by the defective operation and installation of that machinery, and while it was moving, and in order to keep it moving; where this requirement involved the surmounting of an elevation of 5 feet 7 inches, without provision of any means for doing so, but leaving the youth to get up as best he could, taking advantage of the accidental conditions of the environment; where the employer saw him mount in a certain way when ordering him to do so, and saw him going up the same way time after time; and when finally, in so mounting, the foot of this youth was caught by a useless and extraneous plank fastened to the table, and was

by such plank held against a spiked roller revolving in the table, and torn off; when such employer virtually admits its negligence, but insists that as a matter of law its affirmative defenses of assumption of risk and contributory negligence are so clearly made out that no reasonable mind could draw any conclusion to the contrary,—the answer is to point out the self-evident outrage upon an obedient and inexperienced youth that such work should have been imposed on him at all.

It is no wonder that the amended answer discloses the consciousness of this overshadowing fact, by making its repeated denials in every possible form of negation that plaintiff was ordered, expected, required or permitted to mount this push table; no wonder that the superintendent of the mill who verified this answer has not testified in this case. For with the breaking down of that defense, as it did most absolutely, there disappeared any real defense to this action.

The afterthought on the day of the trial, that at any and all times climbing up from or over a lumber buggy was a safe and practicable means of mounting the push table, the necessity for which was at that late date admitted, was a lame substitute for the defense contained in the verified amended answer that plaintiff was not even permitted to mount the push table. For, as we have pointed out, the attempt to mount in that way, unless the load upon the push cart happened to be of a height "just right", involved danger greater even than that of mounting from the carrying table. Doubtless, if plaintiff, in attempting to climb up from an empty push cart, had had his hands crushed, or his brains knocked out or his clothing wound up in the revolving shaft, the defense then would have been that he ought to have gone up over the carrying table.

The more minutely the facts of this case as implied in the verdict of the jury, and the supporting evidence, are

examined, the more we are persuaded will appear the wisdom and humanity of the rule established in this state by an unusual array of concurring decisions, that it was actionable negligence to expose this youth, and that by direct order, as this youth was exposed, to the risk of life and limb *"even with his consent"*. For there was no true consent, and the jury found, and were fully justified in finding, that the plaintiff obeyed, without understanding, comprehending, or appreciating the dangers to which his obedience exposed him.

We most respectfully submit that the learned District Court in its refusal at the trial to direct a verdict for the defendant, and in submitting the case to the jury, and in its refusal upon subsequent application to set aside the verdict, was guided by correct principles of law.

We, also, most respectfully submit that the instructions given fairly, fully and correctly covered the whole case, and that judgment of the court below should be affirmed.

Respectfully submitted,

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HAINES & HAINES,
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APPENDIX.

CHAPTER 97.

An Act to Amend Section 1970 of the Civil Code of the State of California, relating to the responsibility of employers for injury to or death of employees.

[Approved March 6, 1907.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Section 1970 of the Civil Code of the State of California is hereby amended so as to read as follows:

1970. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee; [*provided,* nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employee is injured is employed, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders upon any railroad, or in the operation of any mine, factory, machine shop, or other industrial establishment.

Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures, and thereafter consented to use the same, or continue in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, dependent parents and dependent brothers and sisters, in order of precedure as herein stated, but no more than one action shall be brought for such recovery.

Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee or his personal representative, of any right or remedy to which he is now entitled under the laws of this state.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this section, except in so far as the same are herein modified or changed.

Sec. 2. This act shall take effect and be in force from and after its passage.]